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No. 03 . 3

In The
Supreme Court of the United States

LCT TRANSPORTATION SERVICES, INC. a/k/a/
LESTER COGGINS TRUCKING, INC.,
a Florida corporation,

Petitioner,

v.

VICTOR BARRAGAN, JORGE TORRES,
ROBERTO CAIAFFA, and
ERVING G. PEÑA, Florida citizens,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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I. QUESTIONS PRESENTED

I. Whether an employee whose principal job duties are to load tractor trailers in such a way as to make the tractor trailer safe for travel is properly classified as a "loader" and, therefore, is "exempt" from the overtime provisions of the FSLA?

II. Whether minimal supervision of such employees negates the exemption?

III. Whether an employer must point to a specific Department of Labor opinion to support a "good faith" defense under 29 U.S.C. 259?

RULE 29.6 STATEMENT

Gainey Corporation is the parent company of petitioner Lester Coggins Trucking, Inc. ("LCT"). No other publicly held corporations or companies owns more than 10% of petitioner's stock.

TABLE OF CONTENTS

	Page
Questions Presented	i
Rule 29.6 Statement	ii
Table of Contents	iii
Table of Authorities	iv
Table of Appendices	vi
Petition for Writ of Certiorari	1
Opinions Below	1
Statement of Jurisdiction	1
Statutory Provisions Involved	1
Statement of the Case	2
Reasons for Granting the Writ	7
I. The Lower Court Decision Creates a Conflict among the Circuits as to the Scope of the "Loader" Exemption and the Extent to which Minimal Supervision Will Negate the Exemption	7
II. The Lower Court Decision Is in Conflict with the Decisions of this Court regarding the Scope of the "Loader" Exemption	10
III. As It Pertains to the "Good Faith" Defense, the Lower Court Decision Is Contrary to the Express Terms of the Statute	12
IV. The Case Presents an Issue of Nationwide Importance	13
Conclusion	14

TABLE OF AUTHORITIES

Page

CASES:

Blankenship v. Thurston Motor Lines, Inc., 415 F.2d 1193 (4th Cir. 1969) 8, 9, 10

Cole v. Farm Fresh Poultry, Inc., 824 F.2d 923 (11th Cir. 1987) 12, 13

Henchy v. City of Absecon, 7 Wage & Hour Case 2d (BNA) 183 (D.N.J. 2001) 12

Lassiter v. Guy F. Atkinson Co., 176 F.2d 984 (9th Cir. 1949) 12

Levinson v. Spector Motor Service, 330 U.S. 649, 67 S.Ct. 931 (1947) 7, 10, 11

Morris v. McComb, 332 U.S. 422, 68 S.Ct. 131 (1947) 7

Pyramid Motor Freight Corp. v. Ispass, 330 U.S. 695, 67 S.Ct. 954 (1947) 7, 11

Vaughn v. Watkins Motor Lines, Inc., 291 F.3d 900 (6th Cir. 2002) 8, 9, 10

STATUTES:

29 C.F.R. § 782.2 8

29 C.F.R. § 782.2(a)(1)(2) 8

29 C.F.R. § 782.2(b)(2)(i) 2, 7

29 C.F.R. § 782.5 ..... 8, 13

28 U.S.C. § 1254(1) 1

29 U.S.C. § 207(a)(1) 1, 7

29 U.S.C. § 213(b)(1) 2, 7, 8

29 U.S.C. § 259 ..... 12, 13

TABLE OF AUTHORITIES – Continued

Page

OTHER:

ELLEN C. KEARNS, THE FAIR LABOR STANDARDS ACT § 18.VI.D.1.b.....12

U.S. Census Bureau, Statistical Abstract of the United States 2002, p. 659.....13

Michael Orey, *Lawsuits Abound From Workers Seeking Overtime Pay*, WALL ST. J., May 30, 2002.....13

TABLE OF APPENDICES

Opinion of the United States Court of Appeals for the Eleventh Circuit Filed March 28, 2003.....App. 1

Judgment of the United States Court of Appeals for the Eleventh Circuit Filed March 28, 2003.....App. 9

Order of the United States District Court Southern District of Florida, Miami Division Denying Motions for New Trial Filed March 15, 2003.....App. 11

Michael Orey, *Lawsuits Abound From Workers Seeking Overtime Pay*, WALL ST. J., May 30, 2002.....App. 17

PETITION FOR WRIT OF CERTIORARI

LCT Transportation Services, Inc. ("LCT"), a Florida corporation, petition this Court for a Writ of Certiorari to review the judgment of the Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The opinion of the panel of the Court of Appeals for the Eleventh Circuit (Circuit Judges Hull, Marcus and Farris) is not reported and is reprinted in the Appendix to this Petition ("App.") at 1-8. The Eleventh Circuit's mandate issued on April 29, 2003 and is reprinted attached at App. 9-10.

STATEMENT OF JURISDICTION

The Judgment of the Court of Appeals for the Eleventh Court was entered on March 28, 2003. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

1. 29 U.S.C. § 207(a)(1) requiring employers under the Fair Labor Standards Act ("FLSA") to pay their employees at a rate of "one and one half times" their regular rate of pay for all hours worked in excess of forty hours during any workweek.

2. 29 U.S.C. § 213(b)(1), exempting employers from the overtime provisions of the FLSA for all employees who are exempt.

3. 29 C.F.R. § 782.2(b)(2)(i) including in the definition of exempt persons from overtime under the FLSA as persons who are employed as "loaders" and "drivers," as those terms have been defined by regulation and case law.

STATEMENT OF THE CASE

This is a suit for alleged violation of the FLSA, in which the Plaintiffs are claiming that they were improperly classified as "loaders," which is an "exempt" position under the FLSA. Although the evidence at trial was overwhelming in establishing that the Plaintiffs meet the test for being classified as loaders, the Court of Appeals allowed a jury verdict to stand in favor of the Plaintiffs. In addition, the Court rejected the company's "good faith" defense. Because the Court of Appeals' decision is in conflict with the decisions of other Courts, including prior decisions of this Court, Defendant is seeking Supreme Court review.

A. The Parties

LCT is a Florida corporation engaged in the common and contract carrier business. Although the Company's headquarters and main terminal are located in Okahumpka, Florida, the Company also has a facility in Miami, which was the subject of the lawsuit. With the exception of Juan Rodriguez, each of the Plaintiffs (Roberto Caiaffa, Jorge Torres, Victor Barragan, and Irving Peña) is

or was employed at the Miami terminal as a "warehouseman" or warehouse employee, with the responsibility to load and unload trucks. Rodriguez is employed at the Miami terminal as a "driver," with responsibility not only to load and unload trucks, but also with responsibility to drive those trucks.

B. The Lawsuit

Under Company policy, loaders and drivers were paid at their straight time rate for all hours worked. On June 7, 2000, Plaintiff Barragan filed this lawsuit against LCT, claiming that LCT had violated the FLSA by failing to pay time and one-half for overtime. On January 2, 2001, the remaining Plaintiffs joined in the suit.

From the onset of the case Defendant LCT admitted that Plaintiffs were not paid time and one-half for overtime, but asserted that such payment was permissible under the FLSA because Plaintiffs are "exempt" under the exemptions that apply to "loaders" and "drivers." LCT further asserted that even if Plaintiffs were not exempt LCT had a reasonable and good faith belief that Plaintiffs were exempt, which would operate to bar liability.

C. The Trial

During the trial Defendant presented extensive proofs, not only as to Plaintiffs' loading duties, but also as to their decision-making responsibilities. In response to that evidence, Plaintiffs attempted to show that they never made any decisions with respect to the loading of freight and relied solely on instructions from their supervisors. However, the evidence demonstrated that the loaders

were not under the constant supervision and control of the supervisors and that for approximately every seven loaders there was only one supervisor. The evidence also revealed that the supervisors are not with the loaders during the loading of the vehicles. When the loader does receive assistance with loading they are assisted not by a supervisor but by a temporary employee known as a helper. As to Ciaffa, Torres and Peña, who are more senior employees, the evidence revealed that not only do they exercise discretion and make decisions, but that they also instruct helpers how to load LCT's trailers.

Contrary to Plaintiffs' position, the evidence also revealed that loaders do not receive detailed instruction regarding the loading of LCT's trucks, but instead, they exercise discretion in the proper loading of LCT's trucks. For example, for each load Plaintiff loaders received only one piece of paper referred to as a "loading summary." The loading summary did not instruct the loaders how to load the truck, but only provided the name of the customer, the city and state where that customer is located and the number of boxes of freight for each customer. Even Plaintiff Rodriguez admitted that loaders are not given instructions as to the loading of each truck. Instead, the only instruction that a loader receives from a supervisor is whether the truck is to be loaded "high or low." The supervisors do not tell them how to stack the boxes nor do they tell the loaders where each box is to go. Similarly, the supervisors do not tell them how to make sure that everything is compacted in terms of the box being tight against each other. While a supervisor inspects a load prior to a truck's departure, the supervisor relies in large part on the loader's own loading knowledge and experience. Likewise,

the loaders individually possess responsibility for the proper securing of a load.

While the freight loaded by Plaintiffs consists mostly of flowers and plants, a typical box weighs between 50 to 60 pounds, with some weighing more than one hundred pounds. In addition to flowers, Plaintiffs load other heavy items such as beef, bleach and other hazardous materials. A fully loaded trailer contains approximately 1,200 boxes of freight, and typically weighs between 20,000 to 25,000 pounds.

Due to the weight of the load, Plaintiff Rodriguez testified that an improperly loaded or unevenly loaded truck could be problematic for the driver of the truck. He also admitted that when he is loading a truck he is doing his job with the safety of the truck driver in mind since a load which is improperly loaded or improperly balanced could end up tipping over. To the same effect, Plaintiff Barragan stated that drivers will question the placement of a load since a load which is loaded "on one side is dangerous because it is hard to turn." Likewise, Plaintiff Rodriguez stated that he complains to his supervisor whenever he becomes worried that a load or a trailer is not loaded properly since improper loading might affect the safety of that truck.

Consistent with the Plaintiffs' own testimony regarding safety, the evidence revealed that Plaintiffs received training on safe loading procedures and safety affecting loading techniques. Included in the training was instruction on the use of load locks, the use of bars and plywood referred to as "decking," and a technique referred to as "step down the load" to secure loads from shifting. While loaders receive instruction on the use of safety affecting

techniques they are not told when to use the devices or techniques.

In support of its "good faith" defense, LCT introduced evidence that its classification decision was in conformity with written regulations, which define the loader exemption. In addition, the company president, Dan Denhof, stated that he relied on the: 1) Federal Motor Carrier Safety Regulations; 2) the trailer manufacturer's operator's manual; 3) an article in *Trucking* magazine stating that the shipper had the responsibility of safety; 4) a memorandum from LCT's counsel regarding the overtime exemption; 5) business reports and legal review; and 6) LCT's company overtime policy.

At the close of proofs the Court dismissed the company's good faith defense, but allowed the "loader" issue to go to the jury. The jury then returned a verdict for Plaintiffs as to the "loader" exemption.

D. Post Trial Proceedings

After trial LCT filed a motion for new trial on both the "loader" issue and the "good faith" issue, but the district court denied the motion. LCT then appealed to the Eleventh Circuit Court of Appeals. On March 28, 2003, the Eleventh Circuit, in an unpublished opinion, affirmed the decision of the trial court in all respects. (App. at 1-8.) In so holding the Court relied on the fact that Plaintiffs were supervised in their loading activities. (App at 5.) In addition the Court found that LCT's good faith defense was deficient inasmuch as LCT had not established its reliance on any "written opinion from the Department of Labor". (App at 6.)

REASONS FOR GRANTING THE WRIT

Under Rule 10 of the Supreme Court Rules, a petition for certiorari is appropriate when (1) the decision below has created a direct conflict in the circuits; (2) the decision is in conflict with this Court's own precedent; and (3) the case presents significant issues of nationwide importance. In the present case each of these grounds exist.

I.

The Lower Court Decision Creates a Conflict among the Circuits as to the Scope of the "Loader" Exemption and the Extent to which Minimal Supervision Will Negate the Exemption

Under the FLSA, employers have a general obligation to pay their employees at a rate of "one and one half times" their regular rate of pay for all hours worked in excess of forty hours during any workweek. 29 U.S.C. § 207(a)(1). However, the Act does not require employers to pay time and one-half if an employee is "exempt." 29 U.S.C. § 213(b)(1). Among the persons who are "exempt" from overtime under the FLSA are persons who are employed as "loaders," as that term has been defined by regulation and case law. 29 C.F.R. § 782.2(b)(2)(i); *see Levinson v. Spector Motor Service*, 330 U.S. 649 (1947); *Pyramid Motor Freight Corp. v. Ispass,* 330 U.S. 695 (1947); *Morris v. McComb*, 332 U.S. 422, 68 S.Ct. 131 (1947).[1]

[1] These exemptions derive from section 13(b)(1) of the Act, which provides that the overtime provisions of the FLSA shall *not* apply to "any employee with respect to whom the Secretary of Transportation

(Continued on following page)

A loader is defined as an "employee whose duties include the proper loading of the employer's motor vehicle so that the vehicle may be safely operated on the highways of the country." 29 C.F.R. § 782.5. To be exempted, a loader must engage in activities which "directly affect the safety" of vehicles which transport property in interstate commerce. 29 C.F.R. § 782.2. Case law and federal regulations have long recognized that loaders and partial-duty loaders affect safety. 29 C.F.R § 782.5.

The fact that a loader is subject to the supervision of a manager or supervisor does not negate the loader's "safety affecting" activity. When an employee exercises initial discretion in determining the proper placement of freight on a vehicle, but a supervisor periodically conducts checks to ensure that the vehicles are loaded properly, the loading employees are "loaders" exempt from the FLSA's overtime provisions. *Vaughn v. Watkins Motor Lines, Inc.*, 291 F.3d 900 (6th Cir. 2002); *Blankenship v. Thurston Motor Lines, Inc.*, 415 F.2d 1193 (4th Cir. 1969). Consequently, even if

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has power to establish qualifications and maximum hours of service pursuant to the provisions of Section 204 of the Motor Carrier Act, 1935." 29 U.S.C. § 213(b)(1). Employees fall within the provisions of the Motor Carrier Act and the power of the Secretary of Transportation if they: (1) Are employed by carriers whose transportation of passengers or property by motor vehicle is subject to his jurisdiction under section 204 of the Motor Carrier Act, and (2) engage in activities of a character directly affecting the safety of operation of motor vehicles in the transportation on the public highways of passengers or property in interstate or foreign commerce within the meaning of the Motor Carrier Act. 29 C.F.R. § 782.2(a)(1)(2). Applying these tests, the Department of Labor as well as the United States Supreme Court have determined that the FLSA overtime exemption is applicable to those employees whose activities include, wholly or in part, those of a driver or loader.

the loaders are supervised, they are still "loaders" who "affect safety" and qualify under the exemption.

In *Blankenship v. Thurston Motor Lines, Inc.*, 415 F.2d 1193 (4th Cir. 1969), the trial court found that the plaintiff was properly classified as a loader because he was subject to close supervision. The Fourth Circuit reversed, reasoning as follows:

> It is true that they and the other loaders were supervised, that is, were told which trucks to load and that their work was checked, albeit somewhat haphazardly. These factors, however, do not render inconsequential the initial discretion exercised by [the loaders]. We, therefore, hold . . . that at least where, as here, the employee retains some appreciable discretion in conducting the loading operation in the first instance, his employer is exempt from the overtime provisions of the FLSA.

Id. at 1197.

In *Vaughn v. Watkins Motor Lines, Inc.*, 291 F.3d 900 (6th Cir. 2002), the facts were similar. Although the plaintiffs received periodic instruction from their supervisors on the proper loading of freight, the Court of Appeals nonetheless concluded that the plaintiffs exercised sufficient judgment and discretion necessary to be classified as loaders and, therefore, were exempt from the overtime provisions of the FLSA. In so holding the Sixth Circuit relied expressly on *Blankenship v. Thurston Motor Lines, Inc., supra.*

In the present case the facts are remarkably similar to the facts in both *Blankenship* and *Vaughn*. Yet, the Court of Appeals reached a different conclusion. In so holding, the Court noted that the Plaintiffs were subject to supervision,

but that is no different than the situation in *Blankenship* or *Vaughn*. Thus, the lower Court's decision creates a conflict among the Circuits regarding the scope of the loader exemption and the extent to which minimal supervision will negate the exemption.

II.

The Lower Court Decision Is in Conflict with the Decisions of this Court regarding the Scope of the "Loader" Exemption

In *Levinson v. Spector Motor Service,* 330 U.S. 649, 67 S.Ct. 931 (1947), this Court affirmed a lower court's finding that an employee was exempt under the loader exemption. The employee was part of a team of employees who unloaded incoming freight and loaded the freight on outgoing trucks. *See id.* at 656, fn. 7. In loading the truck the team of employees loaded according to the size and the weight of the freight placing heavy freight on the bottom and light freight on top. *See id.* The loading of the freight according to such a plan was followed in "the interests of safety." *See id.* This Court in concluding that the loading of freight is a duty that directly affects the safe operation of the vehicle emphasized the significance of properly loaded freight and stated:

> [A] motor vehicle must be properly loaded to be safely operated on the highways of the country. If more weight is placed on one side of the vehicle than on the other, there is a tendency to tip when rounding curves. If more weight is placed in the rear of the vehicle, the tendency is to raise the front wheels and make safe operation difficult. Further, it is necessary that the load be distributed properly over the axles of the motor vehicle.

> Proper loading is not only necessary when heavy machinery, steel, and other like commodities are being transported, but is of importance when normal package freight is handled. If several packing cases weighing from 150 to 200 pounds are loaded on one side of a motor vehicle or at one end thereof, and lighter freight on the other side or at the other end, safe operation is difficult. *The great majority, if not all, of the carriers whose operations are of sufficient size or character to justify the employment of loaders handle freight of such weight that proper loading is necessary.*

Id. (emphasis added).

In *Pyramid Motor Freight Corp. v. Ispass,* 330 U.S. 695, 67 S.Ct. 954 (1947), this Court *reiterated* that the principles set forth in *Levinson* govern an employee's classification as a loader for purposes of the FLSA. The Court then remanded the case to the district court for a decision on the merits, with instructions to give special attention to the those activities relied upon in *Levinson*. *Id.* at 707. Consistent with *Levinson* this Court stated "[i]f the whole or a substantial part of such alleged 'loading' activities of the respective respondents, during the periods at issue, do come within the kind of activities which, according to the commission, affect such safety of operation, then those respondents who are engaged in such activities are excluded from the benefits of s 7." *Id.* at 708.

Here the evidence is overwhelming in establishing that the Plaintiffs are directly engaged in loading activities that have a direct bearing on the safe operation of motor vehicles. Yet, the Court of Appeals found that the Plaintiffs were not properly classified as exempt under the "loader" exemption. Thus, the Court of Appeals' decision is

contrary to the decisions of this Court regarding the scope of the loader exemption.

III.

As It Pertains to the "Good Faith" Defense, the Lower Court Decision Is Contrary to the Express Terms of the Statute

As to the issue of good faith, Section 10 of the FLSA expressly provides that "no employer shall be subject to any liability or punishment for or on account of the failure of the employer to pay . . . overtime compensation under the Fair Labor Standards Act . . . if he pleads and proves that the act or omission complained of *was in good faith* in conformity with *and in reliance on any written regulation, order, ruling, approval, or interpretation of* . . . the Administrator of Wage and Hour Division of the Department of Labor." 29 U.S.C. § 259 (emphasis added). To establish this defense the employer must show "(1) good faith reliance and (2) good faith conformity with the writing relied upon." *See Henchy v. City of Absecon*, 7 Wage & Hour Case 2d (BNA) 183, 188 (D.N.J. 2001). The test is objective and provides an *absolute defense to liability*, even if the employer was wrong in its belief that the plaintiff was exempt. *See Cole v. Farm Fresh Poultry, Inc.*, 824 F.2d 923, 926-29 (11th Cir. 1987). The question of whether an employer acted in good faith is fact intensive and to be decided by the trier of fact. *See* ELLEN C. KEARNS, THE FAIR LABOR STANDARDS ACT § 18.VI.D.1.b. *See also Lassiter v. Guy F. Atkinson Co.*, 176 F.2d 984, 993 (9th Cir. 1949).

In the present case the court took the "good faith" issue away from the jury on the grounds that the company had not relied on any "written opinion from the Department

of Labor". However, the statute does not require the employer to act in reliance on a "written opinion from the Department of Labor". Instead, the statute allows the employer to also act in reliance on "any written regulation, order, ruling, approval, or interpretation". 29 U.S.C. § 259. Thus, the Court of Appeals' decision is contrary to the express terms of the Act.

In support of its decision the trial court relied on the Eleventh Circuit's decision in *Cole v. Farm Fresh Poultry*, 824 F.2d 923, 926-29 (11th Cir. 1987). However, the *Cole* decision expressly permits reliance on a regulation *if the regulation specifically addresses the issue upon which the employer is seeking information. Id.* at 927-929. Here the regulations, at 29 C.F.R. § 782.5, are *exceedingly* specific and detailed in defining the loader exemption, and do not merely state that loaders who affect safety are exempt. Therefore, LCT was not required to rely on a "written opinion from the department of labor" and its reliance on the regulations was both reasonable and permissible for purposes of the good faith exception. The Eleventh Circuit's decision improperly limits the good faith affirmative defense in direct contravention of 29 U.S.C. § 259 and *Cole*.

IV.

The Case Presents an Issue of Nationwide Importance

As of the year 2000 there were approximately 110,416 trucking establishments in the United States. *See* U.S. Census Bureau, Statistical Abstract of the United States 2002, p. 659. During the past several years, FLSA litigation has been on the rise. *See* Michael Orey, *Lawsuits Abound From Workers Seeking Overtime Pay*, WALL ST. J.,

May 30, 2002, at App. 17-21. Given these two circumstances, it is certain to follow that many other suits, similar to this suit, will be brought across the country. Thus, the issues presented in this case are of nationwide importance.

CONCLUSION

For all of the foregoing reasons, the Petition should be granted and Judgment below reversed.

Respectfully submitted,

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[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 02-12492

D.C. Docket No. 00-02040 CV-JLK

VICTOR BARRAGAN,
a Florida citizen on behalf of himself
and all other Florida citizens similarly
situated,
JORGE TORRES,
ROBERTO CIAFFA,
ERVING E. PENA,
JUAN RODRIGUEZ

Plaintiffs-Appellees,

versus

LCT TRANSPORTATION SERVICES, INC.,
a.k.a. Lester Coggins Trucking, Inc.,

Defendant-Appellant.

No. 02-12954

D.C. Docket No. 00-02040 CV-JLK

VICTOR BARRAGAN,
a Florida citizen on behalf of himself and
all other Florida citizens similarly situated,
et al.,

Plaintiffs,

JUAN RODRIGUEZ,

Plaintiff-Appellant
Cross-Appellee,

versus

LCT TRANSPORTATION SERVICES, INC.,
a.k.a. Lester Coggins Trucking, Inc.,

Defendant-Appellee
Cross-Appellant.

Appeals from the United States District Court
for the Southern District of Florida

(March 28, 2003)

Before HULL, MARCUS and FARRIS*, Circuit Judges.

PER CURIAM:

In this Fair Labor Standards Act ("FLSA") 29 U.S.C. § 201 *et seq.* case, defendant LCT Transportation Services, Inc. ("LCT") appeals from the district court's denial of its motion for a new trial and its motion for fees and costs. After a jury trial, the district court entered final judgment for four of the five plaintiffs, Victor Barragan, Jorge Torres, Roberto Ciaffa, and Erving E. Pena, awarding them a combined total of $19,859.33 in overtime wages.

On appeal, LCT claims that the district court erred in denying LCT's motion for a new trial because (1) the jury's

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* Honorable Jerome Farris, United States Circuit Judge for the Ninth Circuit, sitting by designation.

verdict regarding the FLSA "loader" exemption was contrary to the great weight of the evidence; (2) the district court improperly ruled regarding certain safety evidence and safety arguments; (3) the district court improperly eliminated LCT's good faith defense under 29 U.S.C. § 259. Further, LCT claims on appeal that the district court erred in denying its motion for attorneys' fees and costs pursuant to Federal Rule of Civil Procedure 54(d)(1) and 28 U.S.C. § 1927.

The fifth plaintiff, Juan Rodriguez, cross-appeals from the district court's grant of LCT's motion for judgment on his claim as a matter of law. Rodriguez asserts that the district court erred in concluding that Rodriguez was covered by the FLSA "driver" exemption. After review and oral argument, we affirm the district court in all respects.[1]

Regarding LCT's appeal, we review the district court's denial of its motion for new trial for abuse of discretion. *Steger v. Gen. Elec. Co.*, 318 F.3d 1066, 1081 (11th Cir. 2003); *Lambert v. Fulton County*, 253 F.3d 588, 595 (11th Cir. 2001), *cert. denied*, ___ U.S. ___, 122 S.Ct. 2361, 153

[1] As a preliminary matter, we address plaintiffs' assertion that this Court lacks jurisdiction to address any issues other than the district court's denial of LCT's motion for attorneys' fees and costs. We disagree. LCT's April 12, 2002 notice of appeal seeks to appeal from the district court's March 15, 2002 denial of its motion for a new trial. Although the March 15 order was non-final and thus LCT's April 12 notice was premature, that April 12 notice of appeal ripened when the district court entered its final judgment dated April 19, 2002. *See* Fed. R. App. P. 4(a)(2). Further, LCT's April 26, 2002 notice of cross-appeal was filed after the district court entered its April 19, 2002 final judgment, and thus the issues listed in that notice are also properly before this Court. In sum, all of the issues asserted by LCT in its various notices of appeal are now properly before this Court.

L.Ed.2d 182 (2002). "A judge should grant a motion for a new trial when the verdict is against the clear weight of the evidence or will result in a miscarriage of justice, even though there may be substantial evidence which would prevent the direction of a verdict." *Lipphardt v. Durango Steakhouse of Brandon, Inc.*, 267 F.3d 1183, 1186 (11th Cir. 2001) (citation and internal quotation marks omitted). Additionally, we review the district court's ruling on an award of sanctions under 28 U.S.C. § 1927 for abuse of discretion. *McMahan v. Toto*, 256 F.3d 1120, 1128 (11th Cir. 2001), *petition for cert. filed*, 71 U.S.L.W. 3579 (U.S. Mar. 5, 2003) (No. 02-1292). And, we review a district court's denial of costs under Rule 54(d) for abuse of discretion. *Fireman's Fund Ins. Co. v. Tropical Shipping & Const. Co.*, 254 F.3d 987, 1012 (11th Cir. 2001).

Regarding Rodriguez's cross-appeal, we review *de novo* the district court's grant of a motion for judgment as a matter of law. *Snapp v. Unlimited Concepts, Inc.*, 208 F.3d 928, 932-33 (11th Cir. 2000), *cert. denied*, 532 U.S. 975, 121 S.Ct. 1609, 149 L.Ed.2d 474 (2001); *Mendoza v. Borden, Inc.*, 195 F.3d 1238, 1244 (11th Cir. 1999) (*en banc*). A party is entitled to judgment as a matter of law only where " 'there is no legally sufficient evidentiary basis for a reasonable jury to find for [the opposing] party.' " *Richardson v. Leeds Police Dep't.*, 71 F.3d 801, 805 (11th Cir. 1995) (quoting Fed. R. Civ. P. 50(a)(1)).

First, LCT argues that it is entitled to a new trial because the jury's verdict regarding the FLSA "loader" exemption was contrary to the clear weight of the evidence. Section 213(b)(1) of the FLSA exempts from its overtime provisions "any employee with respect to whom the Secretary of Transportation has power to establish qualifications and maximum hours of service pursuant to

the provisions of section 31502 of Title 49." 29 U.S.C. § 213(b)(1). The exemption applies to employees, such as loaders and drivers, who engage in activities "directly affecting the safety of operation of motor vehicles in the transportation on the public highways of passengers or property in interstate or foreign commerce within the meaning of the Motor Carrier Act." 29 C.F.R. § 782.2(a).

The § 213(b)(1) exemption encompasses loaders "whose duties include . . . the proper loading of his employer's motor vehicles so that they may be safely operated on the highways of the country." 29 C.F.R. § 782.5(a). Specifically, to be exempted, a loader must exercise "judgment and discretion" in loading the vehicle. *Id.* A thorough review of the record compels us to conclude there was sufficient evidence to support the jury's finding that plaintiffs did not exercise discretion in loading the trucks. For example, there was ample evidence at trial that the loaders followed detailed instructions from supervisors regarding how to load the trucks and that the supervisors inspected the trucks prior to their departure. Thus, the district court did not err in denying LCT's motion for a new trial on this ground.

Second, LCT argues that it is entitled to a new trial because of the district court's rulings regarding certain safety evidence and safety arguments. The record indicates that the district court arguably precluded only evidence and arguments about a safety training session, not about safety in general. In any event, both parties discussed safety in their closing arguments, and LCT has not shown that the district court's ruling affected a "substantial right" such that a new trial is warranted. *See Haygood v. Auto-Owners Ins. Co.*, 995 F.2d 1512, 1515 (11th Cir. 1993); Fed. R. Evid. 103(a). Thus, the district

court did not err in denying LCT's motion for a new trial on this ground.

Third, LCT argues that the district court should have submitted to the jury LCT's good faith defense under 29 U.S.C. § 259. Section 259 provides an absolute defense to liability under the FLSA if the employer proves that "the act or omission complained of was (1) taken in good faith and was (2) in conformity with and (3) in reliance on a written administrative interpretation by [the Administrator of the Wage and Hour Division of the Department of Labor]." *Cole v. Farm Fresh Poultry, Inc.*, 824 F.2d 923, 926 (11th Cir. 1987); 29 U.S.C. § 259(a). Here, LCT did not make the required showing, and thus the district court did not err in this regard. *See Cole*, 824 F.2d at 928 ("The administrative interpretation relied upon must provide a clear answer to the particular situation in order for the employer to rely on it.").

Finally, LCT contends that the district court erred in denying its motion for fees and costs pursuant to Rule 54(d)(1) and 28 U.S.C. § 1927. Under Rule 54(d)(1), a "prevailing party" is entitled to "costs other than attorneys' fees" unless there is an "express provision" otherwise in a federal statute or the Federal Rules of Civil Procedure, or "unless the court otherwise directs." Under 28 U.S.C. § 1927, "[a]ny attorney or other person . . . who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct." After thorough review, we conclude that the district court did not err in determining that LCT was not entitled to costs as a prevailing party or partially prevailing party under

Rule 54(d)(1), and did not err in concluding that LCT was not entitled to fees and costs pursuant to § 1927.[2]

On cross-appeal, plaintiff Rodriguez contends that he is not covered by the FLSA exemptions related to "drivers," and thus LCT is not exempt from paying him overtime wages. *See* 29 U.S.C. § 213(b)(1), (b)(11). The district court concluded that Rodriguez's position fell within § 213(b)(1). We agree.[3] For the purposes of the § 213(b)(1) exemption, a driver "is an individual who drives a motor vehicle in transportation which is ... in interstate or foreign commerce." 29 C.F.R. § 782.3(a). To qualify as a "driver," it is not necessary for the employee to drive across state lines; instead, it is sufficient that the employee carry cargo that is moving in interstate commerce. *See* 29 C.F.R. §§ 782.3, 782.7. For example, if the goods are coming to a warehouse from out-of-state and are shipped to predetermined destinations within the state, such goods are traveling in interstate commerce. *See Martin v. Airborne Express*, 16 F. Supp. 2d 623, 628-29 (E.D. N.C. 1996), *aff'd*, 155 F.3d 559 (4th Cir. 1998); *see also* § 782.7. Likewise, when goods are shipped from a location within a state to a location within the same state, but are predetermined for delivery outside the state, they are moving in interstate commerce. *See Martin*, 16 F. Supp. 2d at 628-29; *see also* § 782.7.

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[2] LCT's claim that is [sic] entitled to attorneys' fees and costs based on the common law also lacks merit.

[3] We reject Rodriguez's claim that § 213(b)(1) and § 213(b)(11) are mutually exclusive. Rodriguez cites no authority for this assertion, and the language and structure of § 213 does not support it.

There is no dispute that Rodriguez does not travel across state lines and drives primarily around the Miami area. However, there was evidence at trial indicating that Rodriguez transports cargo that originates out-of-state and is bound for predetermined locations in Florida, and that he transports freight within Florida that is predestined for shipment outside of Florida. Thus, Rodriguez meets the definition of "driver" as defined by the regulations and falls within the § 213(b)(1) exemption. Therefore, we conclude that there was no reversible error in the district court's grant of judgment as a matter of law on Rodriguez's claim.

AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 02-12492

D.C. Docket No.
00-02040 CV-JLK

VICTOR BARRAGAN,
a Florida citizen on behalf of himself
and all other Florida citizens similarly
situated,
JORGE TORRES,
ROBERTO CIAFFA,
ERVING E. PENA,
JUAN RODRIGUEZ

Plaintiffs-Appellees,

versus

LCT TRANSPORTATION SERVICES, INC.,
a.k.a. Lester Coggins Trucking, Inc.,

Defendant-Appellant.

No. 02-12954

D.C. Docket No.
00-02040 CV-JLK

VICTOR BARRAGAN,
a Florida citizen on behalf of himself and
all other Florida citizens similarly situated,
et al.,

Plaintiffs,

JUAN RODRIGUEZ,

Plaintiff-Appellant
Cross-Appellee,

versus

LCT TRANSPORTATION SERVICES, INC.,
a.k.a. Lester Coggins Trucking, Inc.,

Defendant-Appellee
Cross-Appellant.

Appeals from the United States District Court
for the Southern District of Florida

JUDGMENT

It is hereby ordered, adjudged, and decreed that the attached opinion included herein by reference, is entered as the judgment of this Court.

Entered: March 28, 2003
For the Court: Thomas K. Kahn, Clerk
By: Alvin, Keturah

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

VICTOR BARRAGAN, et al.,

Plaintiffs,

v.

LCT TRANSPORTATION SERVICES, INC., a/k/a LESTER COGGINS TRUCKING, INC.,

Defendants. /

CASE NO. 00-2040-CIV-KING

ORDER DENYING MOTIONS FOR NEW TRIAL

(Filed Mar. 15, 2002)

THIS CAUSE is before the Court upon Defendant's Motion for a New Trial and Plaintiffs' Motion for New Trial both filed January 23, 2002. Plaintiffs filed a Response on February 7, 2002. Defendant filed a Response on February 8, 2002. Defendant filed a Reply on February 15, 2002. Plaintiffs filed a Reply on February 22, 2002.

I. STANDARD OF REVIEW

This Court is afforded discretion in ruling on motions for new trial. *See McDonough Power Equipment v. Greenwood*, 464 U.S. 548, 556 (1984). The Court is particularly reluctant to set aside a jury's verdict. *See Hewitt v. B.F. Goodrich Co.*, 732 F.2d 1554, 1556 (11th Cir. 1984). The Court will only do so if the jury's verdict "was against the great weight of the evidence." *Id.* at 1556. The Court will

not overturn a jury verdict and grant a motion for a new trial based on alleged errors in evidentiary rulings unless a party's "substantial rights" have been affected by the rulings. *See* Fed. R. Evid. 103(a); *Haygood v. Auto-Owners Ins. Co.*, 995 F.2d 1512, 1515-19 (1993).

II. DEFENDANT'S MOTION

Defendant moves for a new trial based on: (1) the Court's elimination of Defendant's Section 259 "good faith" affirmative defense; (2) the Court's ruling that the parties were not to argue regarding the Plaintiffs' "safety training" in closing arguments; and (3) that the jury's finding that Plaintiffs were not exempt from the Fair Labor Standards Act was against the great weight of the evidence.

The Court correctly eliminated Defendant's Section 259 affirmative defense. Defendant never elicited or relied on a written opinion from the Department of Labor that addressed the particular circumstances of this case. Accordingly, Defendant could not rely on the good faith affirmative defense. *See Coley Farm Fresh Poultry, Inc.*, 824 F.2d 923, 926-29 (11th Cir. 1987). Allowing Defendant to rely on a Section 259 affirmative defense in the circumstances of this case "would mean that any employer could establish a good-faith defense simply by showing that it 'relied' on a general administrative guideline that provided no opinion regarding the employer's particular situation." *Id.* at 928. Therefore, the Court did not err in eliminating Defendant's good faith defense.

Nor did the Court err in prohibiting the parties from mentioning Plaintiff's safety training in closing arguments. The Court's ruling was in response to *Defendant's*

motion to exclude Plaintiff's evidence suggesting that documents relating to the Plaintiffs' safety training had been fabricated. The Court's ruling was not error. If the Court had allowed Defendant's arguments regarding safety training, the arguments would have been greatly undermined by Plaintiffs' evidence of fabrication. Accordingly, no party's "substantial rights" have been affected by the ruling, and a new trial is not warranted. *See* Fed. R. Evid. 103(a); *Haygood*, 995 F.2d at 1515-19.

Defendant's final argument in support of its Motion for a new Trial is that the jury's finding that Plaintiffs were not exempt from the Fair Labor Standards Act was against the great weight of the evidence. There was evidence to support jury findings that Plaintiff did not have discretion in loading the trucks and that the placement of flowers in the truck would not affect the safety of the trucks in transit. It is not for the Court to re-weigh the evidence or reassess witness credibility. *See Hewitt*, 732 F.2d at 1558-59 ("The right to trial by jury would be substantially impaired if a jury's verdict could be set aside because it is based on evidence that the trial judge weighed differently."). Accordingly, Defendant is not entitled to a new trial.

II. [sic] PLAINTIFFS' MOTION

Plaintiffs move for a new trial based on (1) the Court's ruling excluding expert testimony and documentary evidence regarding safety-related documents allegedly fabricated by Defendant; and (2) that Plaintiffs were unfairly surprised at trial by testimony of Defendant's corporate representative.

As stated above, the Court correctly excluded evidence regarding safety-related documents and prohibited the parties from mentioning Plaintiffs' safety training in closing arguments. The Court's ruling properly kept the trial focused on the primary issues in the case rather than being sidetracked by the injection of a forgery element into the trial. No party's "substantial rights" have been affected by the ruling, and a new trial is not warranted. *See* Fed. R. Evid. 103(a); *Haygood*, 995 F.2d at 1515-19.

Plaintiffs arguments regarding unfair surprise and discovery abuses are more troubling to the Court. It appears from the record that Plaintiffs requested all of the documents upon which Defendant relied upon in treating Plaintiffs as exempt from overtime compensation. In response, Defendant produced a copy of Section 216 of the Fair Labor Standards Act and a memorandum from counsel. At a hearing in front of Magistrate Judge O'Sullivan on Plaintiffs' Emergency Motion to Compel, Defendant represented that there were no other documents to satisfy this request and made a certification to that effect. During his deposition, Defendant's corporate representative testified that there were no other documents Defendant relied upon in treating Plaintiffs as exempt from overtime compensation.

At trial, however, Defendant's corporate representative testified that he relied on various never-before mentioned documents including Federal Motor Carrier Safety Regulations, a trailer manufacturer's operator's manual, an article in Trucking magazine, business reports, and legal reviews. Plaintiffs argue that this "surprise" testimony unfairly prejudiced them and resulted in the jury verdict that Defendant's violation of the Fair Labor Standards Act was not willful.

Plaintiff's have waived their right to object this testimony by: (1) failing to object to the testimony at trial; (2) failing to move to strike the "surprise" testimony; and (3) failing to request a curative instruction be given to the jury. Had they done so, the Court could have sustained the objection, stricken the testimony, and given a curative instruction to mitigate any possible prejudice resulting from the testimony. In fact, Plaintiffs did not even use the corporate representatives prior inconsistent testimony on deposition to impeach his testimony at trial. Surely such impeachment would have greatly mitigated any possible prejudice.

In short, any prejudice suffered by Plaintiffs is due to their failure to bring this matter to the Court's attention in a timely manner before the jury's verdict. This situation is just what Fed. R. Evid. 103(a)(1), requiring counsel to object to the disputed testimony at trial, is designed to guard against. Plaintiffs clearly waived any objection to this testimony and it cannot form the basis of a motion for a new trial. *See* Fed. R. Evid. 103(a)(1).

III. [sic] CONCLUSION

Accordingly, after a careful review of the record and the Court being otherwise fully advised, it is

ORDERED and ADJUDGED that Defendant's Motion for a New Trial be, and the same is hereby, DENIED. It is further

ORDERED and ADJUDGED that Plaintiffs' Motion for New Trial be, and the same is hereby, DENIED.

DONE and ORDERED in chambers at the James Lawrence King Federal Justice Building and United

States Courthouse, Miami, Florida, this 15th day of March, 2002.

/s/ James Lawrence King
JAMES LAWRENCE KING
U.S. DISTRICT JUDGE
SOUTHERN DISTRICT OF FLORIDA

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Lawsuits Abound From Workers Seeking Overtime Pay

By Michael Orey

What do insurance-claims adjusters, chicken processors and copy-machine technicians have in common?

They are among tens of thousands of workers around the country who lawsuits claim were cheated out of overtime pay by their employers. Employment attorneys say the number of these cases has exploded recently, partly because plaintiffs' lawyers, seeing the potential for big payouts, have rushed to file claims on behalf of large groups of employees.

Last year, the number of so-called collective actions brought under the Fair Labor Standards Act, the federal statute that sets wage and hour rules, exceeded the number of class actions alleging job discrimination. "It's the complaint du jour," says David Ross, an attorney in the New York office of Seyfarth Shaw, which represents employers.

The stakes can be high. Last year alone, SBC Communications Inc.'s SBC Pacific Bell settled a suit for $35 million, Coca-Cola Bottling Co. of Los Angeles settled a suit for $20.2 million, and Bank of America Corp. settled a suit for $22 million. In July, a state-court jury in Oakland, Calif., hit a Farmers Insurance Group unit with a $90 million verdict for failing to pay overtime to 2,400 of its claims adjusters in the state. (Farmers is appealing.)

Farmers also faces claims in federal district court in Portland, Ore., on behalf of its adjusters nationwide.

Wal-Mart Stores Inc. is defending overtime cases in 28 states. And in March, Minolta Business Solutions Inc. was sued in federal district court in New York by technicians seeking to represent people who service copy machines.

Overtime rules have been on the books since the 1930s, generally requiring payment of time-and-a-half to anyone working more than 40 hours a week. Laws in many states contain additional protections. The federal law, however, carves out dozens of exemptions for certain workers, including those deemed "managerial," "administrative" or "professional."

Plaintiffs' lawyers say companies improperly categorize employees to save on labor costs. "If you walk into to [sic] a lot of chain restaurants, you'd be astonished at how many 'managers' they have, most of whom are waiting on tables," says Richard Seymour, a Washington, D.C., attorney who represents workers. Similar disputes have arisen in newsrooms, including that of The Wall Street Journal, published by Dow Jones & Co. At issue is whether reporters are professionals. Camille Olson, a Seyfarth attorney who represents newspapers, says the answer depends on whether a paper is national or regional and how much a reporter's duties involve such things as analysis and expertise.

Farmers Insurance classified its claims adjusters as "administrators," when in fact, plaintiffs maintained they were more like production workers, with little discretion in how they did their work. This year, a New Jersey state appeals court found that Pepsi Bottling Group Inc. had improperly failed to pay overtime to delivery-truck drivers

and customer representatives in New Jersey. The company had classified these employees as "outside" sales people, another exempted category under the overtime law. Spokeswoman Kelly McAndrew says the company is in discussions with the New Jersey Department of Labor to bring the matter to a close.

Besides misclassification claims, the most common overtime complaint is that companies require employees to work off the clock. A suit filed against Wal-Mart in New York state court in Albany – typical of many filed against the chain around the country – alleges that store employees were routinely told to punch out when the store closed and then required to keep working.

William Wertz, a spokesman for Wal-Mart, says the company denies the allegations in the lawsuits. It is company policy "to comply fully with all federal and state wage and hour requirements" and to prohibit any off-the-clock work by hourly employees, Mr. Wertz says.

The complaint against Minolta Business Solutions, a subsidiary of Japan's Minolta Co., alleges that copy-machine technicians weren't paid for work performed after 5 p.m. and during unpaid lunch hours or for time spent on weekends purchasing work-related supplies. Allan Hans, general counsel for Minolta Corp. in Ramsey N.J., declines to comment on any active litigation but says, "It's our policy to pay people for the hours that they work."

The surge in overtime cases filed by class-action law firms began in California. State laws there are particularly "employee-friendly," says Tyler Paetkau, an attorney at McCutchen, Doyle, Brown & Enersen in San Francisco, who represents employers. To classify someone as a manager, for example, California requires an employer to

document that the person spends more than 50% of the time engaged in managerial functions, while federal law applies a more flexible standard.

The bulk of major settlements to date have involved companies' California operations.

With plaintiffs' lawyers now aggregating large numbers of claims in a single suit, Mr. Paetkau says damages can add up quickly. Employers found to have violated the federal wage and hour law typically must pay double the back wages owed, plus attorneys' fees.

Noting that many provisions of the federal law are decades-old, some employment lawyers say the law isn't always easy to apply to new job arrangements such as flex time. Calls to overhaul the statute haven't produced much progress. Instead, Congress tinkers. In 1996, for example, it said employers don't have to pay overtime to certain high-earning computer workers. That joins other exemptions on the books, including one for beekeepers.

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Question of the Day: Is overtime dispensed fairly in your workplace? Visit WSJ.com/Question to vote.

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All Work, No Extra Pay

Workers who may be exempt from overtime laws under the Fair Labor Standards Act

– Beekeepers

– Holly wreath weavers

– Truck drivers who cross state lines

– Seasonal amusement park workers

– All agricultural workers

– Retail salespeople whose commission earnings equal one and a half times the current federal minimum wage

Source: Department of Labor